



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

September 19, 2003

Ms. Sherri Russell
Assistant City Attorney
P.O. Box 2570
Waco, Texas 76702-2570

OR2003-6601

Dear Ms. Russell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187932.

The City of Waco (the "city") received eleven requests for information related to the requestor's termination. You state that some responsive information will be made available to the requestor. You claim that information responsive to four of the requests is excepted from disclosure under sections 552.103, 552.108, 552.117, and 552.136 of the Government Code, and under Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you tell us that the city contacted the requestor and informed him that the city considered Request Number 5 unclear, and asked him to clarify his request. We note that a governmental body must make a good-faith effort to relate a request to information that it holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). You inform us, however, that no clarification

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

had been received as of the date of your request to this office. Section 552.222(b) of the Government Code provides the following:

If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request. If a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed, but the governmental body may not inquire into the purpose for which information will be used.

Gov't Code § 552.222(b). Thus, if the city is uncertain about the scope of the request, it may ask the requestor to clarify the request and discuss with the requestor how the scope of the request might be narrowed. As you inform us that the requestor did not submit a clarified request as of the date of your submission to this office, you need not release information that may be responsive to the fifth request for information. Should the requestor submit such a clarification, however, the city must seek a ruling from this office before withholding any responsive information from the requestor. *See also* Open Records Decision No. 663 (1999) (providing for tolling of ten business day time limit to request attorney general decision while governmental body awaits clarification).

We next address your responsibilities under the Public Information Act (the "Act"). Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

It appears from the documents submitted to this office that the city received the requests for information on June 26, 2003. You did not request a decision from this office until July 14, 2003. Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); see Open Records Decision Nos. 630 (1994), 319 (1982). This office has held that a compelling reason exists to withhold information where some other source of law makes the information confidential or when third party interests are at stake. See Open Records Decision No. 150 at 2 (1977).

Rule 503 of the Texas Rules of Evidence does not constitute a compelling reason to overcome the presumption under section 552.302. See Open Records Decision No. 676 at 11 (2002) (assertion of rule 503 does not demonstrate "compelling reason" under section 552.302 to prohibit governmental body's release of information); cf. Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107). Furthermore, section 552.103 of the Government Code is a discretionary exception under the Act and, therefore, does not overcome the presumption that the submitted information is public information. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). Also, you have not provided a compelling reason under section 552.108 to overcome the presumption of openness. See Open Records Decision Nos. 586 (1991) (need of *another* governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Therefore, you may not withhold the requested information under rule 503, or under sections 552.103 or 552.108 of the Government Code. On the other hand, because sections 552.117 and 552.136 can provide compelling reasons for withholding information, we will address your arguments under those exceptions.

You assert that the social security numbers of "all employees named in Request Numbers 1-8" are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of peace officers regardless of whether the officers request confidentiality under section 552.024.² The city must withhold the social security numbers of peace officers under section 552.117(a)(2).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. The city must withhold the social security number of an employee who timely elected to keep his personal information confidential under section 552.117(a)(1). The city may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential.

If a timely election was not made, we note that social security numbers must be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).³ *See Open Records Decision No. 622 (1994)*. These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the responsive information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal

²"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

³Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the city should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Lastly, the submitted information contains account and access device numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The city must, therefore, withhold the account numbers and personal identification numbers that you have marked under section 552.136.

In summary, social security numbers of peace officers must be withheld under section 552.117(a)(2). The city must withhold the social security number of an employee who timely elected to keep his personal information confidential under section 552.117(a)(1), but may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential. Social security numbers not excepted under section 552.117 may be confidential under federal law. The city must withhold the marked account numbers and personal identification numbers under section 552.136. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

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CN/jh

Ref: ID# 187932

Enc. Submitted documents

c: Mr. Larry C. Kelley
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(w/o enclosures)